

**Construction & General Laborers Union, Local 304,
Laborers International Union of North America
and Athejen Corporation. Case 32-CC-433**

March 30, 1982

DECISION AND ORDER

**BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER**

On August 17, 1981, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge, but not to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Construction & General Laborers Union, Local 304, Laborers International Union of North America, Emeryville, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging any individual employed by Frank Electric, California Air, Asteco Steel, Kaiser Concrete, Jestco, Nelson Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is to force or require the said persons, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Athejen Corporation.

(b) Threatening, coercing, or restraining Frank Electric, California Air, Asteco Steel, Kaiser Con-

crete, Jestco, Nelson Company, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require said persons to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Athejen Corporation.

2. Take the following affirmative action necessary to effectuate the policies of the National Labor Relations Act, as amended:

(a) Post at its office and meeting halls copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by its authorized representative, shall be posted by Construction & General Laborers Union, Local 304, Laborers International Union of North America, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Construction & General Laborers Union, Local 304, Laborers International Union of North America, to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and return to said Regional Director sufficient copies of the attached notice marked "Appendix" for posting by Frank Electric, California Air, Asteco Steel, Kaiser Concrete, Jestco, and Nelson Company, if willing, in conspicuous places, including all places where notices to their employees are customarily posted.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

MEMBER JENKINS, dissenting:

Contrary to my colleagues, I would find that Respondent did not violate Section 8(b)(4)(i) and (ii)(B) of the Act by picketing, in the course of its primary dispute with Athejen, the separate gate reserved for employees of the subcontractors Athejen had engaged to aid it in performing the construction work it was obligated to complete. Accordingly, I would dismiss the complaint in its entirety.

Athejen is engaged in the building and construction industry as a general contractor. At all times relevant to this case, Athejen has been engaged in

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² In lieu of the Administrative Law Judge's recommended Order, we will issue an Order which reflects more precisely the language traditionally used in remedying the violations found herein.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the construction of a building for the Bank of America in Emeryville, California. Athejen's own employees—nonunion carpenters whose numbers varied between three and six—performed certain work on the building. All other work on the building, as well as the demolition of an old building adjacent to the construction site and installation of a parking lot in its place, was performed by approximately 25 subcontractors retained by Athejen.

On October 23, 1980,⁴ one of Respondent's representatives indicated in conversation with Peter Dayak, Athejen's field superintendent, that Respondent intended to picket the jobsite. In response, on October 24 Dayak installed two separate gates at the construction site. Gate 1 was reserved for Athejen's employees and suppliers; gate 2 was reserved for Athejen's subcontractors and their employees and suppliers. At various times, as set forth in the Administrative Law Judge's Decision, Respondent and other unions picketed both gates. All of the picket signs utilized by Respondent clearly indicated that the primary disputant was Athejen. The Administrative Law Judge found, and my colleagues agree, that Respondent's picketing at gate 2 was secondary in nature and thus violative of Section 8(b)(4)(B) of the Act, relying on *Moore Dry Dock Company*⁵ and *Malek Construction Co.*⁶

I continue to adhere to my view that *General Electric Company*⁷ and *Carrier Corporation*⁸ require the Board to apply the "related work" tests to "separate gate" picketing on a common situs. As Member Fanning and I have argued in our dissents since *Markwell and Hartz*,⁹ the *General Electric-Carrier* tests were intended by the Supreme Court to be of general applicability to all industries, including the construction industry. See *Malek Construction Co.*, *supra* (dissenting opinion), and cases cited therein. As we stated in *Malek Construction*, "[t]he tests enable the Board to distinguish between primary picketing, which is protected by the proviso to Section 8(b)(4)(B), and secondary picketing proscribed by that section." *Id.*

As was true in *Malek Construction*, there can be no dispute but that Athejen was engaged in its normal operations with employees from the building and construction trades, that Athejen subcon-

tracted portions of the work involved to other employers in the construction trades, that the work performed by employees of the 25 subcontractors present at the site was closely related to Athejen's "normal operations," and that the work of the subcontractors was such that Athejen's normal operations would be very shortly or immediately curtailed if the subcontractors ceased work. Accordingly, I would find that the *General Electric* "related work" tests have not been met in this case, and that Athejen's installation of separate gates may not be used to bar appeals from Respondent to employees of Athejen's subcontractors for those employees to observe Respondent's picket line. In sum, I find that Respondent's picketing is primary in nature and protected by the proviso to Section 8(b)(4)(B) of the Act. Thus, I would dismiss the complaint.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT induce or encourage any individual employed by Frank Electric, California Air, Asteeco Steel, Kaiser Concrete, Jestco, Nelson Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is to force or require the said persons, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Athejen Corporation.

WE WILL NOT threaten, coerce, or restrain Frank Electric, California Air, Asteeco Steel, Kaiser Concrete, Jestco, Nelson Company, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require said persons to cease using, selling, handling, transporting, or otherwise dealing in the products of, or to cease doing business with, Athejen Corporation.

CONSTRUCTION & GENERAL LABOR-
ERS UNION, LOCAL 304, LABORERS
INTERNATIONAL UNION OF NORTH
AMERICA

⁴ Unless otherwise noted, all dates are 1980.

⁵ *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547 (1950).

⁶ *Sacramento Area District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, AFL-CIO (Malek Construction Co.)*, 244 NLRB 890 (1979).

⁷ *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO (General Electric Company) v. N.L.R.B.*, 366 U.S. 667 (1961).

⁸ *United Steelworkers of America, AFL-CIO, et al. (Carrier Corporation) v. N.L.R.B.*, 376 U.S. 492 (1964).

⁹ *Building and Construction Trades Council of New Orleans, AFL-CIO (Markwell and Hartz, Inc.)*, 155 NLRB 319 (1965).

DECISION

STATEMENT OF THE CASE

ROGER B. HOLMES, Administrative Law Judge: Based upon an unfair labor practice charge filed on December 1, 1980, by Athejen Corporation, the General Counsel issued on December 10, 1980, a complaint alleging violations of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, by Construction & General Laborers Union, Local 304, Laborers International Union of North America.

The hearing was held on June 18, 1981, at Oakland, California. The due date for the filing of post-trial briefs was set for July 16, 1981.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The Board's jurisdiction in this case is an issue to be resolved. Athejen Corporation is engaged in the building and construction industry as a general contractor. It has an office in San Ramon, California. As will be discussed more fully later herein, Athejen Corporation has been engaged since mid-October 1980 in the construction of a building for the Bank of America at 43d Street and San Pablo Avenue in Emeryville, California. During November and December 1980, Athejen Corporation received in excess of \$50,000 from the Bank of America as partial payment for its construction of a new bank building.

Bank of America is engaged in providing banking services to its customers. The bank received revenues in excess of \$500,000 during the 12 months prior to the hearing date, and the bank annually has transmitted funds in excess of \$1 million from its offices in California to places outside the State. The Board previously has asserted its jurisdiction over the substantial operations of the Bank of America. See, for example, *Bank of America National Trust and Savings Association*, 196 NLRB 591 (1972). See also the Board's Decisions involving the same bank reported at 174 NLRB 101 (1969) and 174 NLRB 298 (1969).

In view of the foregoing, and the entire record herein, I find that Athejen Corporation meets the Board's indirect outflow jurisdictional standard, and that Athejen Corporation is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act. *Siemons Mailing Service*, 122 NLRB 81 (1958).

The status of the Respondent Union as a labor organization within the meaning of Section 2(5) of the Act was admitted.

II. ALLEGED UNFAIR LABOR PRACTICES

1. The witnesses and credibility resolutions

Two persons were called as witnesses during the hearing of this proceeding. They are: Matthew J. Hansen, who has been the president and the secretary of Athejen Corporation for approximately 2 years, and Peter M. Dayak, who has been the field superintendent of the employer for the past 4 years.

The findings of fact to be set forth herein will be based upon the testimony given by Hansen, portions of the testimony given by Dayak, and upon documentary evidence introduced by the parties at the hearing. I found both Hansen and Dayak to be credible witnesses, notwithstanding the fact that the cross-examination of Dayak by the attorney for Respondent revealed some imperfections in Dayak's recollections on the witness stand. Some of those matters will be discussed below. However, as the counsel for the General Counsel points out, Dayak's testimony stands on the record uncontradicted and uncontroverted by any other witness. Dayak was on the witness stand for the majority of the hearing day, and his testimony covered numerous events. In many instances, his answers to the questions being put to him during cross-examination by the attorney for Respondent were not responsive to the question being asked, and that practice tended to prolong the duration of his time on the witness stand. However, I do not believe that Dayak was fabricating his testimony, and I will base many findings of fact upon the portions of his testimony which appear to be accurate and reliable recollections of these past events. See, for example, the Board's Decision in *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053, fn. 1 (1979).

During the course of his cross-examination, Dayak was extensively questioned regarding his job diaries. Some of those job diaries were introduced into evidence as Respondent's Exhibits 3, 4, 5, and 6. At first, the documents appeared to be inconsistent with portions of Dayak's testimony, but his explanations regarding the nature of his job diaries served to clarify the matter. He described his diaries as being notes which he made on a daily basis. However, he indicated that those notes were not complete. For example, when he was questioned as to whether he had made entries in his job diaries regarding persons who were picketing to show who was there, and when they were there, Dayak explained: "Pretty much, due to the fact, you know, in a job diary you can't write everything down. I've got a job to run too. But to the best of my knowledge, I try to at least make a little note in there, two pickets one day, or whatever it is, one at each gate or something of that nature." In addition, Dayak indicated at the hearing that the pickets would "drift" from one gate to another. Thus, even though his job diary would indicate that a picket was at a certain gate, that did not mean that the picket remained stationary throughout the workday at that particular gate. His explanations in that regard seemed believable.

During the pretrial phase of the proceeding, Dayak gave a total of 6 affidavits to various agents of Region 32 of the Board on different occasions. Two of those pretrial affidavits were introduced into evidence for impeachment purposes as Respondent's Exhibits 1 and 2. The parties stipulated that in none of those six affidavits did Dayak state that the pickets were employed by the Respondent Union, Frank Savoy, or anyone else. I have weighed that omission from his pretrial affidavits along with the other matters mentioned herein.

At first, there was a conflict between Dayak's hearing testimony and his pretrial affidavit which he had given

on December 2, 1980. Dayak at first denied that a subcontractor named Nelson had told him that deliveries could not be made without approval of the Teamsters union. However, after he was confronted with his affidavit, Dayak acknowledged on the witness stand that Nelson had so informed him.

Dayak also acknowledged that an error had been made in the affidavit which he had given on December 11, 1980, to an agent for Region 32 of the Board. (See Resp. Exh. 1.) In his affidavit, Dayak stated, "The text of the sign at Gate #3 is attached and labeled Exhibit #1." At the hearing, Dayak corrected that to state that there was no gate number 3 at the jobsite. Apparently, what had happened was that the numbers given in that sentence of the affidavit were reversed. Exhibit 3 attached to the affidavit purports to show the language on the sign at gate number 1. Thus, the reference in the affidavit should have been to gate number 1 and Exhibit 3 attached to that affidavit.

In that same affidavit, there at first appeared to be a conflict between the statement in the affidavit and Dayak's testimony on the witness stand regarding the cessation of picketing by persons who carried Laborers union picket signs. In his affidavit, Dayak stated, "On December 10, 1980, picketing of Gate #2 by persons carrying picket signs bearing 'Laborers Local 304' ceased." At the hearing, Dayak testified that such picketing did not cease on December 10, 1980. Upon reflection, however, what had initially appeared to be a conflict was explained by the fact that his affidavit had been given on December 11, 1980. Thus, that statement in his affidavit only covered the situation as it existed at that point in time.

Dayak also acknowledged during cross-examination by the attorney for the Respondent that there was an omission in his affidavit which he had given on December 16, 1980. The omission was the fact that the persons with Laborers picket signs always had two signs.

With regard to the remarks which Dayak attributed to one of the employer's attorneys about the NLRB, I believe that was simply a misunderstanding. It would seem to be an unlikely and improbable misrepresentation by an attorney in private practice. While Dayak maintained his certainty of the remarks, I believe this was more likely to be a failure of communication between the persons involved.

During the cross-examination of Dayak by the attorney for Respondent, Dayak revealed that another employee of Athejen was present when he had a conversation at the jobsite on October 23, 1980, with two persons whom he believed to be representatives of the Respondent Union. The conversation will be described in section 2 herein. The name of the Athejen employee is Charles Copland. Copland was not called as a witness by any party. In the circumstances presented here, I have decided not to apply what has been referred to as the "missing witness" rule. See, for example, *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, fn. 1 (1977). As has been pointed out above, Dayak's testimony was not controverted by any other witness, and, thus, his version of the events on October 23, 1980, remains undenied. In addition, Copland appears to fall into the category of a wit-

ness who would be available, by subpoena if necessary, to all parties. In *Hitchiner Manufacturing Company*, 243 NLRB 927 (1979), the Board held at 927:

At the outset, we note that the Administrative Law Judge erred in drawing an adverse inference against the General Counsel for not calling Schulte as a corroborating witness. Thus, Schulte was equally available to Respondent to refute Henningfeld's testimony as she was to the General Counsel to corroborate it, but Respondent also failed to call the witness. In such circumstances, we have concluded no inference should be drawn. See *Atherton Cadillac Inc.*, 225 NLRB 421, 422, fn. 3 (1976).

Having considered the foregoing matters, and the arguments advanced by the attorneys, I have accepted Dayak's testimony given at the hearing, and I will rely upon portions of his testimony in making many of the findings of fact.

2. The events prior to November 25, 1980

Some of the matters to be set forth in this section also continued during the time period covered by section 3 since the building was still under construction until the middle of March 1981. However, the date of November 25, 1980, provides a convenient reference point in relating the facts in view of the change in the location of gate number 2 at that time, and the fact that the earliest date on which the General Counsel alleges that unfair labor practices occurred was on or about November 26, 1980.

As pointed out above, Athejen Corporation, which is the primary employer herein, has been engaged in the construction of a building for the Bank of America. The jobsite is located at 43d Street and San Pablo Avenue in Emeryville. Construction of the new structure began on October 15, 1980, and the new building was not completed until mid-March 1981. In addition to constructing the new bank building, the employer also has the job of removing the old building adjacent to the construction jobsite, and putting in a parking lot where the old building once stood. The general superintendent on the job is Dayak, who usually works 5 days a week from 7:30 a.m. to 4:30 p.m. Periodically during the construction of the new building, Dayak left the jobsite at noon in order to check on the progress of one or two other smaller construction jobs which the Employer had undertaken. Dayak said that the other jobs were about 10 minutes away from the jobsite in question here, and he estimated that he was away from the jobsite only about 1 percent of his worktime.

Athejen had its own employees on the construction site. They were a crew of carpenters, and their number varied from three to six persons. It was admitted in the pleadings that Respondent has been engaged in a primary labor dispute with Athejen.

In addition to its own employees, Athejen subcontracted various work to certain subcontractors. One of those subcontractors was Frank Electric, which performed the electrical construction work on the jobsite. Dayak explained, "They have to run the building. They have to run all the lines, do all the conduits, build the panels, run

light fixtures." Frank Electric's employees also installed a temporary power pole on the jobsite. Dayak testified, "Well the power poles were put out because [before] any of the gates were even installed." (It seems logical from the context that Dayak meant to say "before" rather than "because" in that sentence.) Pacific Gas & Electric Company, which is a public utility, furnished the electrical current to the project. (See G.C. Exh. 6, which is marked as to the location where the electrical power enters the jobsite.) Dayak said, "At that time, it was way before any pickets of any nature." Of the 25 subcontractors who worked on the project, Dayak estimated that the majority of those subcontractors plugged into the temporary power pole. Some of the subcontractors utilized their own generating equipment.

Other subcontractors on the project included California Air, which did the sheet metal work; Asteeco Steel, which performed the steel and rebar work; Kaiser Concrete, which supplied the concrete; Jestco, which did the concrete finishing; Nelson, which did the lathing and plastering, and ZZZ Sanitation, which supplied the sanitation facilities on the jobsite. With regard to the employees of ZZZ Sanitation, Dayak said that they came to the project "maybe a couple of times" during the picketing, and that they used gate number 1. Dayak said that the sanitation facilities were used by Athejen employees. Those facilities were the only portable facilities on the jobsite, and Dayak imagined that employees of subcontractors were welcome to use those facilities, but he did not know whether they did so. The old bank and a nearby restaurant and service station also had restroom facilities.

On October 23, 1980, Dayak was in Athejen's trailer at the jobsite when he observed two men approach two Athejen employees on the project. At that time Dayak walked out of the trailer and went toward the men. Dayak overheard the two men ask to see the cards of the two Athejen carpenters. The carpenters responded that the two men should see Dayak.

Dayak then asked the two men if he could help them, and they replied that they were asking his employees for their cards. Dayak told them, "We are a non-union shop." Dayak once again asked the two men if he could help them, and he also asked if they had a business card. One of the two men said his name was Frank Savoy, and he gave Dayak a business card.

A copy of the business card, which was given to Dayak on that occasion by the person who had identified himself to Dayak as being Frank Savoy, was introduced into evidence as General Counsel's Exhibit 2. Among other things, such as the Respondent Union's name, the printing on the card shows, "Frank Savoy" and underneath that name, "President/Field Representative." In addition to that business card, Dayak recalled at the hearing that the person who identified himself as Frank Savoy also showed another card to Dayak on that occasion. The other card was covered in plastic. Dayak could not recall the words on that card, but he said that the card indicated that Frank Savoy was a union representative from Local 304. Furthermore, sometime earlier perhaps as long as 1 or 2 years prior to October 23, 1980, Frank Savoy had introduced to recall on the witness

stand the circumstances surrounding his earlier to Dayak at that time at another jobsite location. Dayak was unable to recall on the witness stand the circumstances surrounding his earlier meeting of the man who had introduced himself as being Frank Savoy.

Returning now to the conversation which took place at the jobsite on October 23, 1980, the man who said he was Frank Savoy asked Dayak why Dayak did not have a laborer on the job. Dayak answered that the job was too small to warrant a full-time laborer working on that job, and that Dayak could not keep a laborer busy enough to work a full day's job every day. The other man identified himself as Henry Jones, and he informed Dayak, "We'll see about that. We'll picket this job." The man who had identified himself as Frank Savoy said, "Yes, we will."

As a result of the foregoing conversation, Dayak installed two separate gates at the construction site on October 24, 1980. As mentioned above, Dayak had a trailer at the jobsite. That trailer was situated in a parallel position with 43d Street and about midway between the bounds of the jobsite on 43d Street. Gate number 1 was established on the jobsite at 43d Street about 30 feet from the end of the trailer which was furthest from the intersection of 43d Street and San Pablo Avenue. Gate number 2 was established on the jobsite at 43d Street about 6 to 10 feet from the opposite end of the trailer which was closest to the intersection of 43d Street and San Pablo Avenue. The two gates were approximately 50 feet apart. Dayak testified that he and the Athejen employees only used gate number 1, and that the subcontractors and their employees used gate number 2.

As will be described in the next section, the location of gate number 2 was changed on November 25, 1980. Subsequently, photographs were taken of both gates as they existed on December 2, 1980. (See G.C. Exh. 4(a), (b), and (c).) The wording on the signs, which are depicted in the photographs, did not change, and the signs remained for the duration of the picketing.

The wording on the sign at gate number 1 was:

NOTICE
GATE # 1
THIS GATE RESERVED FOR
THE EXCLUSIVE USE OF
ATHEJEN
CORP.
THEIR EMPLOYEES AND
SUPPLIERS ONLY
ALL OTHERS USE GATE #2
NO ACCESS WITHOUT WRITTEN
PERMISSION BY GEN. CONTRACTOR
CALL

The wording on the sign at gate number 2 was:

NOTICE
GATE # 2
THIS GATE RESERVED FOR
THE EXCLUSIVE USE OF ALL
CONTRACTORS, SUBCONTRACTORS,
& THEIR EMPLOYEES & SUPPLIERS
EXCEPT FOR THE FOLLOWING
CONTRACTORS
ATHEJEN
CORP.
THEIR EMPLOYEES AND
SUPPLIERS MUST USE
GATE # 1 ONLY
NO ACCESS WITHOUT WRITTEN
PERMISSION OF GEN. CONTRACTOR
CALL

3. The events on November 25, 1980, and thereafter

On November 25, 1980, Athejen relocated gate number 2 from 43d Street to a location on San Pablo Avenue near the wall of the old bank building. (See the diagram of the construction site which was introduced into evidence as G.C. Exh. 6. See also the photographs, which were referred to in sec. 2 herein, and which were introduced into evidence as G.C. Exhs. 4(b) and 4(c).) The reason for moving the location of gate number 2 to San Pablo Avenue was to make feasible the pouring of concrete for the sidewalk at the project.

Gate number 1 remained in the same location which has been described in section 2 herein. The Athejen trailer also remained in the same location as was described earlier. There was no change in any gate location after November 25, 1980, but a cyclone wire fence was installed about November 25, 1980, around the perimeter of the construction project. As a result, gate number 1 had a swinging fence gate approximately 20 feet long, and gate number 2 had a swinging fence gate approximately 10 feet long.

During the first week after November 25, 1980, Dayak again observed the person, who had identified himself to Dayak as Frank Savoy, at the jobsite. At that time Dayak saw that person talking with people at the jobsite who were carrying picket signs with Respondent's name on the signs. Dayak said that the person whom he believed to be Frank Savoy visited the jobsite "periodically" until the construction was completed in mid-March 1981. (The General Counsel does not allege that any unfair labor practices were committed after March 13, 1981.)

Commencing on December 10, 1980, persons who carried picket signs with the Carpenters union's name appeared at the jobsite. According to Dayak, their picket signs stated, "Athejen failed to pay wages and benefits established in this area, Carpenters Local 194." In contrast, Dayak said the picket signs with Respondent's name on them said, "Athejen unfair, Laborers Local 304." At one time Dayak also saw picket signs without any union's name or number on the signs. Dayak acknowledged at the hearing that on some days, when it rained, there were no persons walking with picket signs at the jobsite, but he said that sometimes he saw persons

sitting in a car with a sign tied to the front of the car. Sometimes Dayak also observed that picket signs had been placed on safety cones and positioned next to the fence at the jobsite. Sometimes he saw picket signs tied onto barricades.

The job diaries maintained by Dayak have previously been referred to in section 1. (See the findings of fact therein which need not be repeated here.) Although his job diaries indicate that pickets were at certain gates, Dayak said that pickets would "drift" from one gate to another. For example, Dayak said with regard to picket signs he observed at gate number 2, "Well, at times when at Gate number 2, when anybody approached, they would go down there to Gate number 2. Sometimes put them in a cone, tied them to a fence, whatever was necessary." Dayak also stated, "Any time a subcontractor was approaching Gate number 2 to come through the neutral gate, they would run down there and approach them, either say something to them verbally, or conduct waving or standing in front of them so they couldn't come on to the project." As indicated before in section 1 herein, I found Dayak's explanation regarding the entries in his job diaries to be believable, and that his notations in his diaries did not mean that the pickets remained all day at a particular gate.

At the hearing, Dayak was questioned extensively with regard to his job diary entries on specific dates, and his recollections regarding those dates. With regard to November 25, 1980, Dayak said that there was one picket at gate number 1 and one picket at gate number 2. He acknowledged that there was no reference in his job diary as to whether those pickets were carrying Laborers picket signs or Carpenters' picket signs, but, as indicated above, the persons who carried Carpenters picket signs did not commence picketing until December 10, 1980.

With regard to November 26, 1980, Dayak observed two persons with picket signs with the Respondent's name on them. They were standing at the corner of 43d Street and San Pablo Avenue. They walked "almost all the way to the Gates." A copy of his job diary for November 26, 1980, was introduced into evidence as Respondent's Exhibit 6. It indicates, "pickets all day, standing at corner of 43rd Avenue, not near any Gates." The two persons told Dayak that they were employed by "Frank Savoy, Laborers Union."

On December 3, 1980, there were pickets at both gate number 1 and gate number 2. However, employees of Asteco Steel, who were ironworkers, entered the jobsite through gate number 2.

On December 9, 1980, Dayak noted in his diary that there was one picket with a Laborers sign at gate number 1.

On December 11, 1980, Dayak noted one Laborers picket at gate number 1 and Carpenters picket at gate number 2. He further noted that the Carpenters business agent visited the jobsite on that date.

On December 15, 1980, Dayak noted that there was one Laborers picket at gate number 1 and a Carpenters picket at gate number 2. He said at the hearing that a Pacific Gas & Electric Company employee delivered a new

cover for a gas box on that date and that the employee left it outside the construction project.

With regard to December 16, 1980, Dayak acknowledged at the hearing that he had noted in his job diary that there was one Laborers picket at gate number 1 only. However, he testified that, while the Laborers picket started at gate number 1 on that day, the picket "drifted" to gate number 2. In his pretrial affidavit, which he had given on December 23, 1980, Dayak stated:

Beginning Tuesday, December 16, 1980, Laborers 304 has had pickets and signs at Gate no. 1 and a sign leaning against Gate no. 2. When a supplier arrives, the pickets walk from Gate #1 to #2.

At the time this affidavit is being taken, there are two pickets at Gate no. 1. One for the Laborers and one for the Carpenters. There is a Laborers picket sign at Gate #1 and a Carpenters sign at Gate #2.

Subsequently in that same affidavit, Dayak also stated, "The Laborers and Carpenters have been picketing Gate no. 2 at different times so far this week."

On December 19, 1980, Dayak noted in his job diary, "Picket at Gate #1. Signs at both Gates." Above the word "Picket" is written in different ink the word "Laborer." Dayak said that the latter notation was made the same day in his diary. (See Resp. Exh. 3.)

On December 22, 1980, Dayak noted that the person carrying a Laborers picket sign was at gate number 1.

On December 23, 1980, Dayak noted that there was a Laborers picket at gate number 1 and a Carpenters picket at gate number 2.

On December 24, 1980, Dayak noted that there was one Laborers picket at gate number 1, and no other pickets that day.

On December 26, 1980, Dayak noted that there were no pickets. He said at the hearing that Athejen's six employees were the only ones who were working on the jobsite that day.

On December 29 and 30, 1980, and on January 5, 6, 7, 8, and 9, 1981, Dayak noted each day in his diary that there was one Laborers picket at gate number 1 and one Carpenters picket at gate number 2.

On January 10, 1981, Dayak noted that there were no pickets on that Saturday, although one person worked on the jobsite.

On January 12 and 13, 1981, Dayak noted each day that there was one Laborers picket at gate number 1 and one Carpenters picket at gate number 2.

On January 14, 1981, Dayak noted that there was one Laborers picket at gate number 1, and that the Carpenters picket left gate number 2 at 8:30 a.m. and moved their sign to gate number 1.

On January 15, 1981, Dayak noted that there was a Laborers picket at gate number 1 only, and that there were two Carpenters pickets at gate number 1 and gate number 2.

On January 16, 1981, Dayak noted that there were no Laborers pickets at all that day, and that there were only Carpenters pickets at gate number 1 and gate number 2.

On January 19, 1981, Dayak noted that there were two Carpenters pickets—one at gate number 1 and one at gate number 2.

On January 23, 1981, Dayak noted "two Carpenter pickets in cars. Signs on each Gate, number 1 and 2. Pickets taking pictures of everyone coming into project." There was no mention in his job diary of Laborers pickets that day.

On January 26, 1981, Dayak noted that there was one Laborers picket at gate number 1 only, and there was one Carpenters picket at gate number 1 only.

During the period of time from January 28, 1981, through February 4, 1981, Dayak observed persons with the Respondent's picket signs at gate number 1 and "periodically at Gate number 2." He also noted that a Carpenters picket was at gate number 2, and that Carpenters business agents visited the jobsite and talked to some employees on both February 3 and 4, 1981.

On February 5, 1981, Dayak noted that there was one Laborers picket at gate number 1.

On February 9, 1981, Dayak noted that there was one Laborers picket at gate number 1 only, and that there was one Carpenters picket at gate number 1 only.

On February 10, 1981, Dayak noted that there was one Laborers picket at gate number 1, and that there were two Carpenters pickets at gate number 1.

On February 11, 1981, Dayak noted that there were two pickets at gate number 1. He acknowledged at the hearing that there was no entry in his job diary for that date regarding a Laborers' picket.

On February 12, 1981, Dayak noted that there were no pickets at gate number 2.

On February 13, 1981, Dayak noted that there were two pickets all day at gate number 1.

On February 17, 1981, Dayak noted that there were two pickets all day at gate number 1, and he acknowledged at the hearing that there was no entry in his diary for that date with regard to picketing at gate number 2.

On February 19, 1981, Dayak noted in his diary that there was: "1-Labor 194" and "1-Picket Carp. walking to San Pablo side again." (See Resp. Exh. 4. Note also that the local number stated is the number of the Carpenters local.)

On February 20, 1981, Dayak noted that there was one Laborers picket and one Carpenters picket at gate number 1.

On February 25, 1981, Dayak noted, "1-Carp. 304 Local" and also "Labor 1-Pickets Gate #1, 194 Local." Also, he noted, "(Carp.) left Wed. after off job." The words "off job" are in a different ink or pencil. (Note that the local numbers were reversed in the dairy entries.)

On February 26, 1981, Dayak observed some law enforcement officers at the jobsite. He also saw a person with Respondent's pickets sign at gate number 2 that day. Dayak overheard a conversation between those two persons near gate number 2 that day. Dayak said that he was there "throughout the whole day."

On February 27, 1981, Dayak observed Laborers picket signs at gate number 2, and he overheard persons, who had Laborers picket signs with them at gate number

2, speak to a driver in a delivery truck. He heard them tell the truckdriver that he could not come onto the project, or he would be fined. Dayak identified the driver as being from the bank vault installation company. Dayak said that the driver did not enter the jobsite.

On March 2, 1981, Dayak noted in his job diary, "didn't see him myself today (Labor)."

III. CONCLUSIONS

Respondent urges that the General Counsel's three amendments to his complaint during the hearing were untimely made. (See, for example, the post-trial brief filed by the attorney for Respondent.) As the attorney for Respondent correctly points out, the General Counsel's complaint in this case had issued on December 10, 1980, which was more than 6 months prior to the hearing of June 18, 1981. The two lawyers differ, however, in their recollections as to whether written notice had been given, about 8 days prior to the hearing, with regard to the General Counsel's intention to move to amend his complaint regarding alleged commerce facts and Frank Savoy's alleged union office and agency status. The attorney for Respondent requests in his post-trial brief that the rulings allowing the General Counsel to make the three amendments be reversed, and that the amendments not be allowed.

Two of the General Counsel's proposed amendments were made at the outset of the hearing proceedings and before any evidence was presented. Those amendments pertained to commerce data and Frank Savoy. The third amendment was proposed by the counsel for the General Counsel later that morning of the hearing day during his direct examination of his principal witness, Dayak.

Originally, the General Counsel in paragraph 2(c) of his complaint had alleged commerce facts regarding Ath-ejen based on an indirect inflow theory for asserting the Board's jurisdiction over the Employer. That allegation had been denied by Respondent, who indicated in the answer that Respondent was without knowledge of those alleged facts. At the hearing, counsel for the General Counsel moved to amend paragraph 2(c) of his complaint to allege facts based on an indirect outflow theory for asserting the Board's jurisdiction over the employer. That amendment was granted over the objection of Respondent, and the new allegation was also denied. Subsequently, the parties did reach agreements on stipulations regarding certain facts pertaining to the business operations of the Bank of America and the amounts of money received by the employer from services provided for the Bank of America.

The second amendment proposed at the hearing by the counsel for the General Counsel pertained to Frank Savoy, whom the General Counsel alleged to be the president of Respondent and an agent of Respondent. During the discussion of that proposed amendment, the attorney for Respondent stated, among other things, "I have no objection to the amendment." The General Counsel's motion was granted to add that new allegation as paragraph 5(c) to his complaint. Respondent also denied that allegation.

As indicated above, the General Counsel's third amendment to his complaint came later during the morn-

ing of the hearing day. The proposed amendment followed after an objection was made by the attorney for Respondent to a question by the counsel for the General Counsel which related to a time period from February 26 to mid-March 1981. Paragraph 8 of the General Counsel's complaint had read, in part, "Since on or about November 26, 1980, and continuing to date" I agreed with Respondent's literal reading of that time frame in the allegation. That is, both the attorney for Respondent and I read the words "to date" in the complaint to be the date on which the complaint had been issued. That date was December 10, 1980. That apparently prompted the counsel for the General Counsel to move to amend his complaint to substitute "thereafter" in place of "to date." That request was granted over Respondent's objection. Subsequently, the counsel for the General Counsel made it clear that March 13, 1981, was the last date on which the General Counsel alleges that a violation occurred.

Although Respondent initially indicated that the General Counsel's amendments to his complaint made necessary a continuance to afford Respondent time to prepare its defense, I did not grant a continuance at that point, but instead indicated that we would first listen to the General Counsel's evidence. For example, with regard to the commerce facts amendment, I stated, "So, let's see what the proof is, and then we will see what you want to do about defense with regard to the evidence." With regard to the amendment pertaining to Frank Savoy, I stated, "We will certainly give you an opportunity to be heard on that after you have heard his evidence, and see what he is going to put on with regard to Mr. Savoy. Then we will give everybody a chance to assess the situation and make whatever arguments they would like to make." With regard to the third amendment to the General Counsel's complaint, I stated, "Here again, with regard to the other amendment, we will see what the evidence is, and at that point, after we have heard the evidence, and after Respondent has heard the evidence, we will entertain any motions and give the positions of the parties. At this point, I don't know whether that is going to entail a great deal of evidence or, perhaps, not much evidence. So, that is why I say at this point I don't know whether a continuance would be warranted. Maybe it will be. I certainly will listen to the evidence and see what the positions of the parties are after we—."

After the General Counsel had presented all of his evidence and had rested his case, Respondent decided not to present any evidence at the hearing, and at that point Respondent did not renew his motion for a continuance. After considering all of the foregoing, I have decided to adhere to the rulings made at the hearing, which permitted the General Counsel to make the three amendments to his complaint. In particular, with regard to the first amendment, the parties were able later in the hearing day to arrive at stipulations concerning certain commerce facts. With regard to the second amendment, an objection was not voiced at the time to permitting the amendment. More significantly, however, with regard to all three of the General Counsel's amendments, after Respondent heard all of the General Counsel's case, no evi-

dence was offered to dispute or contradict any of the evidence which the General Counsel had presented in his case-in-chief.

In reaching conclusions based upon the findings of fact set forth in the earlier sections herein, it is well to keep in mind that none of the assertions made by Dayak on the witness stand were contradicted by the testimony of any other witness. Nevertheless, a question arises as to whether Respondent is responsible for any of the picketing which took place at gate number 2 on and after November 26, 1980. Without repeating all of the findings of fact previously made, I conclude that the General Counsel has made out a *prima facie* case that Respondent was responsible for some of the picketing at gate number 2 on various dates between November 26, 1980, and March 13, 1981. In particular, the General Counsel has shown: (1) that Respondent has had a primary labor dispute with Athejen; (2) that Respondent's name appeared on some of the picket signs carried by pickets at the jobsite; (of course, there were other signs with the Carpenters union name and some signs without any union's name, which were displayed by others, but Respondent is not charged with being responsible for those); and (3) the conversation described in section 2 herein involved the person identified to Dayak as being Frank Savoy, president of Respondent. Note also that the person identified to Dayak as being Frank Savoy was later observed talking with pickets who were carrying picket signs with Respondent's name.

In regard to the question concerning the identity of Frank Savoy, I conclude that the General Counsel has made out a *prima facie* showing that the person who identified himself to Dayak as being Frank Savoy was, in fact, Frank Savoy. That conclusion is based upon: (1) Dayak's earlier meeting of the same person on another occasion, and (2) Savoy's business card and other identification shown to Dayak during their conversation on October 23, 1980, at the jobsite. Respondent did not seek to rebut the testimony given by Dayak by calling Savoy or anyone else to deny Dayak's assertions. The same thing holds true with respect to the General Counsel's *prima facie* case concerning Respondent's picketing at gate number 2. The General Counsel's *prima facie* case stands un rebutted.

The record discloses that 1 of the 25 subcontractors on the project, Frank Electric, installed a temporary power pole on the construction site. However, that job was accomplished prior to any picketing at the jobsite by Respondent. With regard to the employees of Pacific Gas & Electric Company, Dayak indicated that they did not come on the jobsite even when they delivered a gas box cover. With regard to ZZZ Sanitation, those employees utilized gate number 1 as a supplier of services to Athejen. I conclude that none of the foregoing matters justified Respondent's picketing at gate number 2, which had been reserved for neutral employers and their suppliers. *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951).

In his post-trial brief, counsel for the General Counsel urges that he is not seeking a finding that Respondent picketed on each working day during the period between November 26, 1980, and mid-March 1981. Instead, coun-

sel for the General Counsel argues that "it is clear that Respondent picketed at gate 2 on many days during that period of time." (See G.C. br.) I find that the evidence supported the argument advanced by the General Counsel. Without repeating the earlier findings concerning Dayak's job diaries, I conclude that his notations in his diaries do not completely reflect all that transpired. As indicated previously, I found his explanation regarding his entries in his job diaries to be believable. Also believable was Dayak's testimony regarding the fact that a Respondent's picket would "drift" from gate number 1 to gate number 2 at various times when persons approached the later gate to enter the jobsite. In addition, there were the times which Dayak described when Respondent's pickets would place Respondent's signs on safety cones and barricades and on the jobsite fence. Even though the picket signs were stationary on those occasions, such actions have been found to constitute a form of picketing. In *Local 182, International Brotherhood of Teamsters (Woodward Motors Inc.)*, 135 NLRB 851 (1962), the Board stated in footnote 1: "We agree with the Trial Examiner that the act of placing the usual picket signs in the snowbank abutting Employer's premises constituted picketing within the meaning of the Act. These signs were watched by Respondent's agents from a car parked on the shoulder of an adjacent highway to make sure they were not removed or destroyed during the entire working day." See also *United Furniture Workers of America, AFL-CIO (Jamestown Sterling Corporation)*, 146 NLRB 474 (1964).

Of course, Respondent was free to picket at gate number 1, which had been reserved for the use of Athejen's employees and suppliers. As noted earlier, Respondent had a primary labor dispute with Athejen. However, the record does not reveal evidence that Respondent had a labor dispute with any other employer on the jobsite. Those neutral employers and their employees and suppliers had gate number 2 reserved for them. Respondent's picketing at gate number 2 suggests that an object of such picketing was to enmesh neutral employers in Respondent's labor dispute with Athejen, and to cause, or attempt to cause, those neutral employers to cease doing business with Athejen. See the Board's Decision in *Sailors' Union of the Pacific, AFL (Moore Dry Dock Company)*, 92 NLRB 547 (1950). In its decision in *Sacramento Area District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, AFL-CIO (Malek Construction Co.)*, 244 NLRB 890 (1979), the Board held at 890: "Like the Administrative Law Judge, we find that Respondent Union's picketing was for the purpose of inducing neutral employees not to perform services for their neutral employers and constituted coercion of those nine employers, thereby violating Section 8(b)(4)(i) and (ii)(B) of the Act. Respondent Union's dispute was with Malek, the general contractor, yet it picketed at the gate reserved for the contractors. Under these circumstances the picketing was clearly secondary and for illegal purposes." That holding by the Board appears to be equally true here.

Finally, based upon Dayak's testimony, I conclude that Frank Electric, California Air, Asteco Steel, Kaiser

Concrete, Jestco, and the Nelson Company are neutral employers and persons who are engaged in an industry affecting commerce. As indicated previously, there is no evidence that Respondent had any labor dispute with those employers. As subcontractors on the construction project, those employers were engaged in the building and construction industry. It is well established that the building and construction industry is an industry affecting commerce.

After considering all of the foregoing, and the arguments persuasively advanced by the two attorneys, I conclude that a preponderance of the evidence establishes that Respondent has engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) as alleged in the General Counsel's complaint.

CONCLUSIONS OF LAW

1. Athejen Corporation is an employer engaged in commerce and in an industry affecting commerce within the meaning of Sections 2(6) and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By inducing or encouraging individuals employed by Frank Electric, California Air, Asteeco Steel, Kaiser Concrete, Jestco, Nelson Company, and other persons engaged in an industry affecting commerce, to engage in a strike, or refusal in the course of their employment to perform services; and by threatening, coercing, or restraining the employers named above, and other persons engaged in an industry affecting commerce, with an object of forcing or requiring any such person to cease doing business with Athejen Corporation, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

4. The unfair labor practices set forth above affect commerce within the meaning of Sections 2(6) and (7) of the Act.

THE REMEDY

Since I have found that Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend to the Board that Respondent be ordered to cease and desist therefrom, and that Respondent take certain affirmative action in order to effectuate the policies of the Act.

[Recommended Order omitted from publication.]